(21,839.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 136.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON *EX REL.* JOHN D. ATKINSON, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1-3 In the Superior Court of the State of Washington in and for Thurston County.

No. —.

STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Complaint.

Now comes the above named plaintiff and for complaint alleges:

I.

That at all the times herein mentioned, the above named defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal place of business situate at Madison, Wisconsin, and a common carrier by railroad doing business within Thurston County, state of Washington.

II.

That at all the times herein mentioned, the above named plaintiff, John D. Atkinson, was, and now is, the duly elected, qualified and acting attorney general of the state of Washington, and as such attorney general the said plaintiff now brings this action.

III.

That defendant, owns and operates a railroad as common carrier in the counties of King and Skagit, State of Washington.

IV.

That on July 3, 1907, train No. 41, being a freight train owned and operated by the defendant herein, left Seattle, King county, Washington, a terminal station on its line, in King County, Washington at 6:30 a. m. and arrived at Sedro-Wooley, a terminal station, at 1:00 a. m., on July 4, and tied up at such terminal station at 2:15 a. m. on July 4, 1907.

4 V.

That the said defendant herein required and permitted the employees, to-wit, two brakemen, one fireman and engineer Dalberg, and conductor Scott, engaged in the movement of the said train, to remain on continuous duty from the time the said train left Seattle

at 6:30 a. m. on July 3, 1907, until it was tied up at Sedro-Wooley at 2:15 a. m. on July 4, 1907; and that the said employees on the said train aforesaid, at said time, were required and permitted to so engage on such continuous duty for nineteen hours and forty-five minutes, and that during all of said time, the said train was operated by said employees between points within the state of Washington; that said employees were not required or permitted to so engage in such continuous duty for such time by reason of any casualty occurring after the said employees had started on the said trip, nor was the same occasioned by accident or unavoidable delay of train scheduled to make connection with the said train upon which said employees were serving, whereby it was prevented from reaching its terminal.

VI.

That the defendant herein is guilty of violating chapter 20 of the laws of 1907, regulating the hours of service of employees in train service upon this railroad, and is liable to the penalties provided under such act.

VII.

That duly verified information of the violation of said chapter 20, laws of 1907, as aforesaid, by defendant herein, has been lodged with the plaintiff by the Railroad Commission of Washington.

Wherefore this plaintiff prays for the penalty provided by law to be recovered in cases of this kind, and asks judgment against the defendant in the sum of $1000, and for such further relief as the facts may entitle this plaintiff.

JOHN D. ATKINSON,
Attorney General,
J. B. ALEXANDER,
Ass't Att'y Gen.,
A. J. FALKNOR,
Ass't Att'y Gen.,
Att'ys for Pl'ff.

5–8 STATE OF WASHINGTON,
County of Thurston, ss:

John D. Atkinson, being first duly sworn, on oath, deposes and says:

That he is the duly elected, qualified and acting attorney general of the State of Washington, and as such, makes this verification.

That affiant is the plaintiff named in the foregoing complaint; that he has read the same, knows the contents thereof and believes the same to be true.

JOHN D. ATKINSON.

Subscribed and sworn to before me this 24 day of August, 1907.

[SEAL.] F. T. HOUGHTON,
Notary Public in and for the State of Washington,
Residing at Olympia.

#3585. Filed in Superior Court, Thurston Co. Wash., Aug. 26, 1907. W. M. Nunn, Co. Clerk.

* * * * * * *

9–14 In the Superior Court of the State of Washington in and for the County of Thurston.

No. 3585.

STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Judgment.

This matter coming on regularly for hearing in the above entitled court on the motion of the plaintiff for the judgment upon the pleading, including the complaint and amended answer, and the Court having duly considered the same hereby grants said motion. Now, therefore, in accordance therewith, it is ordered adjudged and decreed that the plaintiff have and recover of and from the defendant the sum of $1000, and that execution issue to recover the same in the manner provided by law, to all of which the defendant excepts and exceptions allowed.

O. V. LINN, *Judge.*

#3585. 24/637. Filed in Superior Court Thurston Co., Wash., Dec. 4, 1907. W. M. Nunn, Clerk.

* * * * * * *

15 In the Superior Court of the State of Washington in and for the County of Thurston.

STATE OF WASHINGTON, Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Amended Answer.

Defendant, Northern Pacific Railway Company, for its amended answer to the complaint in the above entitled cause, alleges:

I.

Defendant admits that it is a corporation existing and doing business under the laws of the State of Wisconsin, and that it is engaged in the business of a common carrier of persons and property in the State of Washington, including Thurston, King, and Skagit counties. It admits that John D. Atkinson is the Attorney General of the State of Washington.

II.

Defendant admits that on July 3rd, 1907, its freight train No. 41 left the Seattle yards, in King County, at the hour of 6:30 a. m. and arrived in Sedro-Woolley, a terminal station on its lines from Seattle to the international boundary, at 1 o'clock a. m. on July 4th, and at the hour of 1:30 a. m. the employés operating said train quit work. Defendant denies that its employees operating said trains were required to work, and did work on said trip, exceeding nineteen hours. Defendant denies that it has been guilty of violating any law of the State of Washington by reason of
16 the facts stated in the complaint, and denies that it is liable for any penalty provided by the laws of the State of Washington.

For a further and affirmative defense defendant, Northern Pacific Railway Company, alleges:

1. It is a common carrier of persons and property within and between the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon. Its principal business is the carrying of persons and property to and from points within one state to and from points within other states, and to and from points within the several states of the United States to and from points in foreign countries. Defendant is engaged in the business of interstate commerce, and its lines of railroad, locomotives and cars are facilities provided for the carrying on of interstate commerce.

2. The line of railroad between the city of Seattle, in King County, Washington, and the city of Sedro-Woolley, in Skagit County, Washington, is a part of the defendant's railway system, and is a part of its line of railroad connecting with the main line extending from Ashland, Wisconsin, to Portland, Oregon, at Auburn, Washington, and thence running to the International boundary at Sumas. Freight train No. 41, described in the complaint, was, at the time, engaged in hauling various and sundry articles of merchandise from points outside of the State of Washington to points within the State of Washington, and was engaged in hauling various articles of merchandise from points within the state of Washington to points in British Columbia and other foreign countries, and was engaged in hauling various articles of merchandise through the state of Washington from points in other states to points in foreign countries.

3. The Fifty-Ninth Congress of the United States passed an act regulating interstate commerce with respect to the hours of labor of persons employed in operating trains carrying interstate commerce, and on railroads engaged in interstate commerce.
17 The Congess, as shown by its proceedings during the deliberations prior to the passage of said act, for the purpose of enabling the railroads to which it should be applicable to prepare for its operation by changing their division points and making such other changes as the operation of said act would necessitate, postponed the limitation of hours for work of persons employed in the operation of trains, for the period of one year from and after the date of the passage of the act, to-wit: until the 4th day of March,

1908. The said act of the Congress of the United States is applicable to the railroad of the defendant, and was applicable at all the times states in the complaint to the particular train and employés named in the complaint. After the passage of said act of the congress, controlling this defendant with reference to the hours of work of employees engaged in the operation of trains carrying interstate commerce, the law of the state of Washington, (being Chapter XX of the Laws of 1907), was not, and has not since been applicable to employés and trains of this defendant engaged in and carrying interstate commerce, and said law of the State of Washington was not at the time named in the complaint, applicable to the particular train of this defendant therein designated.

4. The Constitution of the United States conferred upon the Congress exclusive power to regulate commerce between the states and with foreign countries. The act of Congress regulating the subject of employment of labor on trains and railroads engaged in interstate commerce, excludes regulation by the state of Washington.

5. The defendant claims immunity from being subject to Chapter XX of the Laws of the State of Washington passed at the legislative session of 1907, and from all regulation imposed by virtue of any law of the State of Washington pertaining to the hours of labor and rest of persons employed in operating its trains engaged in interstate commerce. Defendant claims the right to employ per-
18-26 sons in the operation of its trains engaged in interstate commerce, without restriction of the number of hours of continuous service.

Wherefore, defendant asks to be dismissed with costs.

B. S. GROSSCUP,
Attorney for Defendant.

STATE OF WASHINGTON,
County of Pierce, ss:

B. S. Grosscup, being first duly sworn, on oath says that he is the attorney for the defendant, Northern Pacific Railway Company, in the above entitled action; that the same is a foreign corporation, and that he makes this verification for and in its behalf, being authorized so to do; that he has read the foregoing amended answer, knows the contents thereof and believes the same to be true.

B. S. GROSSCUP.

Subscribed and sworn to before me this 20th day of November, 1907.

C. E. STEVENS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Received a copy of the foregoing amended answer this 21 day of November, 1907.

JOHN D. ATKINSON,
Att'y Gen.,
A. J. FALKNOR,
Ass't Att'y Gen.,
Attorneys for Plaintiff.

#3585. In Superior Court, Thurston Co., Wash. Filed Nov. 25, 1907. W. M. Nunn, Clerk.

* * * * * * *

27 Filed June 28th, 1909.

No. 7776.

STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON, Attorney General, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

The legislature of the state of Washington at its session of 1907 passed an act regulating the hours of service of railroad employees. By the act it was made unlawful for any common carrier operating a railroad to require or permit any of its employees engaged in or connected with the movement of its trains to remain on duty for a longer period than sixteen consecutive hours, except in certain specified instances. A violation of the act was made a misdemeanor, subjecting the offending carrier to a penalty of not less than one hundred nor more than one thousand dollars for each offense, to be recovered in a suit brought by the attorney general on a duly verified information being filed with him showing that a violation of the act had occurred. This act, as it had no emergency clause, went into effect on June 12, 1907.

On March 4, 1907, the congress of the United States passed an act on the same subject-matter. In this act, among other provisions, it was made unlawful for any common carrier, its officers or agents, to require or permit any employee to be or remain on duty for a longer period than sixteen consecutive hours, under a penalty not to exceed five hundred dollars for each and every violation, to be recovered by suit brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where the act was committed, on satisfactory evidence being lodged with the district attorney that there has been a violation of the act. It was expressly provided, however, that this act
28 should "take effect and be in force one year after its passage," or on March 4, 1908.

On August 26, 1907, the attorney general of the state of Washington brought the present action against the appellant charging it with a violation of the state statute in the operation of one of its freight trains between Seattle and Sedro Woolley, both points being within the state of Washington. In the complaint it was averred that the train left the terminal station at Seattle a 6:30 A. M. of July 3, 1907, and reached Sedro Woolley another terminal station at 2:15 A. M. of July 4, 1907, being on the way nineteen hours and forty-five minutes, during which time the employees in charge of the train, to-wit, the engineer, fireman, two brakemen, and the conductor were required to be on continuous duty. Judgment was demanded for one thousand dollars, the maximum amount of the penalty.

The appellant answered admitting the specific charge that it had at the time mentioned required its employees to work continuously for a period of nineteen hours, but denied that it was thereby guilty of violating any state statute. It then set out affirmatively that it was a common carrier engaged in carrying interstate as well as intrastate commerce; that the freight train on which its employees were engaged at the time complained of was carrying various and sundry articles of merchandise shipped from points without the state to points within the state of Washington; various and sundry articles of merchandise shipped from points within the state of Washington to points without such state; and various and sundry articles of merchandise shipped through the state from points without the state to other points without the state. It then set out the act of Congress of March 4, 1907, above mentioned, and averred that it was governed in relation to the number of hours it might require its employees to remain continuously on duty by that statute, and that the statute of the state regulating such hours of labor was not
29 at the time alleged in the complaint of the plaintiff applicable to that particular train, or the employees engaged therein; and claimed immunity from the penalties imposed thereby. A demurrer was interposed and sustained to the answer, whereupon the appellant elected to stand thereon and refused to plead further. Judgment was thereupon entered against it for the full amount of the penalty and this appeal taken therefrom.

Counsel for the appellant concede that it is within the power of the state, in the absence of congressional legislation on the subject, to enact laws operative within the boundaries of the state regulating the number of hours an employee of a railroad company can be required to remain on continuous duty, even though the railroad company may be a common carrier engaged in interstate commerce. On the other hand, it is conceded by the state that the power of the congress to regulate interstate commerce is plenary; and that, as an incident to this power, the congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employee of a carrier so engaged shall be required to remain on duty; and that when it does legislate upon the subject, its act supersedeas any and all state legislation on that particular subject. In fact, these propositions can hardly be said to be debatable in the state courts, since the federal courts, whose decisions are authoritative on questions of this character, have repeatedly announced them as governing principles in determining the validity of regulative legislation concerning carriers of interstate commerce.

Escanaba Co. v. Chicago, 107 U. S. 678;
Morgan v. Louisiana, 118 U. S. 455;
Nashville, &c., Railway v. Alabama, 128 U. S. 96;
Gladson v. Minnesota, 166 U. S., 427;
Lake Shore & Mich. South. Railway v. Ohio, 173 U. S. 285;
Erb v. Morasch, 177 U. S. 584.

Since, therefore, both the congressional and state statutes relate to the same subject-matter, and purport to regulate the same
30 specific acts, it is manifest that the congressional statute superseded the state statute at some point of time, determined by the determination of the status of the congressional act between the time of its enactment on March 4, 1907, and the time it became actively operative on March 4, 1908. If it had the effect of a law during the period it remained in suspension, then manifestly the state statute never went into effect in so far as it related to roads engaged in interstate commerce; while, on the other hand, if it became effective as a law at the expiration of the year, the state statute became effective as against roads engaged in interstate commerce on June 12, 1907, and continued in force until March 4, 1908, and was operative at the time the acts here complained of were committed.

The general rule is that a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. "A law must be understood as beginning to speak at the moment it takes effect, and not before. If passed to take effect at a future day, it must be construed as if passed on that day, and ordered to take immediate effect." Rice v. Ruddiman, 10 Mich. 125.

"A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of passage. Thus, the words 'heretofore,' 'hereafter,' and the like, have reference to the time the statute becomes effective as a law, and not to the time of passage. Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms; it is equivalent to a legislative declaration that the statute shall have no effect until the designated day." 26 Am. & Eng. Ency. Law, 565.

See, also:

Price v. Hopkin, 13 Mich. 318;
Grant v. City of Alpena, 107 Mich. 335;
G. H. & S. A. Ry. Co. v. The State, 81 Tex. 572;
Jackman v. Garland, 64 Me. 133;
The Evansville and Crawfordsville R. R. Co. v. Barbee, 59 Ind. 592.

31 Applying this principle to the question before us, it seems clear that the federal statute did not speak as a statute until after March 4, 1908, the date on which it went into effect; for if a law passed to take effect at a future day must be construed as if passed on that day, and if prior to the time it goes into effect no rights can be acquired under it and no one is bound to regulate his conduct according to its terms, it is idle to say that it has the effect of a statute between the time of its passage and the time of its taking effect. A statute cannot be both operative and inoperative at the same time. It is either a law or it is not a law; and, without special words of limitation, when it goes into effect for one purpose it goes into effect for all purposes. So with this statute, it cannot be a law between the day of its passage and the day it is made to go into

effect for the purpose of superseding the state statute, and not a law for any other purpose. Undoubtedly the federal legislature could have so framed its act as to supersede state legislation on the subject-matter involved, and at the same time have given the carriers affected a year within which to regulate their business to meet the changed conditions, but it did not do this; it postponed the operation of the entire act for one year after its passage leaving the field open for state legislation during that period; and this being true, it follows as of course that the act did not suspend or supersede the state legislation on the same subject-matter on any principle of paramount right of legislation until the end of the year.

These propositions have seemed to us so self-evident as scarcely to admit of debate. Our attention, however, has been called to two recent cases which maintain the contrary view. The first is State v. Chicago, M. & St. P. Ry. Co., 117 N. W. 686. The state statute there before the court was one limiting the number of hours a telegraph operator might be required by the company to remain on continuous duty at the station of a railroad company en-
32 gaged in interstate commerce. The court held the statute invalid on two grounds, first, that the "restriction of the hours of labor of telegraph operators engaged in moving interstate trains or traffic is a field of legislation denied to the state by the federal constitution," and second, that the statute "is in conflict with and in negation of the act of Congress." Discussing the latter question the court used this language:

"Not less obviously the act of Congress declared a policy that interstate railroads should have a reasonable time in which to adjust their business to the new restrictions, by postponing the date when the law should become operative for one year after its passage, thus indicating that such period of time was so necessary to reasonable convenience of interstate commerce. Indeed, this latter implication is not only clear from the act, but made the more certain by reference to the debates and reports of committees attending the consideration and passage of the law of Congress. Hence a state provision to the effect that the time for such preparation and adjustment should be restricted to the 1st of January, 1908, as contained in chapter 575, p. 1188, Laws of 1907, is in direct conflict with the policy of Congress."

The second case is State v. Missouri Pac. Ry. Co. 111 S. W. 500. The state statute before the court was similar to that in question in the former case. The decision was rested on the ground that the federal statute had superseded the state enactment, the court saying:

"We must construe the federal act by reading into its dry letter its manifest spirit and purpose. Its dry letter reads that it shall not go into effect for one year. What was the meaning of, the object to be subserved by, that suspension of the operation of the law? What, except to preserve the equities of the situation by impliedly giving common carriers engaged in interstate commerce one year in which to get a supply of experienced telegraph and telephone operators and trainmen to carry on their business without

interruption and hindrance, and otherwise adjust their business affairs to the shorter hours required by that act? When broadly judged, the federal law must be construed as a notice (in the nature of a caveat) to all state Legislatures, first, that Congress has occupied the ground by its statutory regulations; second, that in its high wisdom it has prescribed and marked out a transition or preparatory period of one year (a sort of truce period). Now with such broad and wise purposes read into the federal act shall any state Legislature thereafter sit in judgment upon the wisdom of such truce period, and say, in effect, 'We deem it too long and too liberal'? Shall it say, in effect, "We see you have suspended your act for one whole year; we find by mathematical computation there is left six months or so which we may cover by a state law, and accordingly we shall pass a law giving shorter hours than yours that will be good at least from June 14, 19[illegible] until March 4, 1908"? If the one law grants, by necessary implication, a breathing spell, shall the other take it away? If the one chalks out a policy, may the other rub it out?

In our opinion the comity that should exist between state and federal legislative power prohibits our taking that ungracious and narrow view."

33 But we are unable to concur in the conclusion reached in these cases. The effect of the decisions is to make the statute speak from the time of its enactment instead of from the time it was made to become a law, thus giving it an effect that the power that enacted it did not give to it. Nor do we think there is any such question of comity involved as requires the courts to hold the state statutes inoperative. That the congress had entered the field of legislation on this subject, and that a state statute on the same subject could at most have but a short life must indeed have been a persuasive argument before the state legislature against the passage of such an act, but it has no force in the courts. The courts must take the statutes as it finds them, and can rightfully refuse to give them force only when they violate some positive principle of government laid down in the fundamental law. Statutes are not to be overturned on mere principles of comity.

The cases where this precise question is involved seem not to be many. Indeed the only one called to our attention, other than the two just referred to, where the direct question was presented is Larrabee v. Talbott, 5 Gill. (Md.) 426. By the seventeenth section of the bankruptcy act of 1841, which was passed on August 19 of that year, it was expressly provided that the act should take effect only from and after the first day of February, 1842. It was claimed that the insolvent laws of Maryland were superseded in their operation between the date of the passage of the act and the date it went into effect. The court denied the claim, using this language:

"The late bankrupt law of the United States was passed on the 19th of August, 1841; but it was expressly provided by the seventeenth section of the statute, that it should take effect only from and after the first day of February, 1842. This is equivalent to declaring that the Act should have no effect until that day; and

therefore, there is no foundation for the point made by the counsel for the appellant; that the insolvent laws of Maryland were suspended in their operation by the Bankrupt Act of the United States, at the period when the proceedings of Rogers & Frick under those laws were commenced, and consummated. At that time, the Bankrupt Act was not in force, and there could have been no conflict between the National and State legislation upon this subject.

In Ex parte Eames, 2 Story Rep. 325, Mr. Justice Story said:

'That as soon as the Bankrupt Act went into operation, in
34 February, 1842, it ipso facto suspended all action on future cases, arising under the State insolvent laws, where the insolvent persons were within the purview of the Bankrupt Act. I say future cases, because very different considerations would or might apply, where proceedings under any State insolvent laws were commenced, and were in progress before the Bankrupt Act went into operation. It appears to me, that both systems cannot be in operation, or apply at the same time to the same persons; and where the State and National legislation, upon the same subject, and the same persons, come in conflict, the National laws must prevail and suspend the operation of the State laws. This as far as I know has been the uniform doctrine maintained in all the Courts of the United States.'"

This decision seems to us more in consonance with correct principles than the more recent cases above cited and we follow it in preference to them.

The judgment is affirmed.

FULLERTON, *J.*

We concur:
RUDKIN, *C. J.*
GOSE, *J.*
DUNBAR, *J.*
CROW, *J.*
PARKER, *J.*
MOUNT, *J.*
CHADWICK, *J.*
MORRIS, *J.*

35 In the Supreme Court of the State of Washington.

No. 7776.

STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON, Attorney General, Respondent,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

MONDAY, *June* 28, 1909.

Judgment.

This cause having been heretofore submitted to the court upon a transcript of the record of the Superior Court of Thurston County

and upon the argument of counsel and the court having fully considered the same, and being fully advised in the premises, it is now on this 28th day of June, A. D. 1909, on motion of John D. Atkinson Attorney General of counsel for respondent, considered, adjudged and decreed that the judgment of the said Superior Court be and the same is hereby affirmed with costs, and that the said John D. Atkinson Attorney General have and recover of and from the said Northern Pacific Railway Company and from the National Surety Co. surety the sum of One Thousand Dollars with legal interest thereon from Dec. 4, 1907, until paid, and the costs of this action taxed and allowed at Thirty-one Dollars, and the execution issue therefor. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

36 In the Superior Court of the State of Washington.

No. 7776.

THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON,
Respondent,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant.

Petition for Writ of Error from the Decision of the Above Entitled Court Rendered Herein on the 28th Day of June, 1909, Confirming the Decision of the Lower Court.

Northern Pacific Railway Company, defendant in the above entitled cause, feeling itself aggrieved by the decision and judgment entered herein by the Supreme Court of the State of Washington on the 28th day of June, 1909, comes now by Geo. T. Reid and J. W. Quick, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, as there is drawn in question in said action the validity of a statute of the State of Washington, on the ground that said statute is repugnant to the laws of the United States, and the decision thereon is against the rights and privileges of this defendant claimed under the laws of the United States.

Also that an order fixing the amount of security which the defendant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court be suspended and staid until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray,

GEO. T. REID AND
J. W. QUICK,
Att'ys for Northern Pacific Railway Company.

37 Indorsed: No. 7776. In the Supreme Court of the State of Washington. The State of Washington ex rel. John D. Atkinson, Respondent, vs. Northern Pacific Railway Company, Appellant. Petition for writ of error. Filed Jul- 30, 1909. C. S. Reinhart, Clerk. Geo. T. Reid, J. W. Quick, Att'ys for N. P. Ry. Co.

38 In the Supreme Court of the State of Washington.

No. 7776.

THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON,
Plaintiff and Respondent,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant and Appellant.

Order Allowing Writ of Error.

Upon motion of J. W. Quick, Esq., attorney for defendant, Northern Pacific Railway Company, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States of America the judgment heretofore entered herein on the 28th day of June, 1909, by the Supreme Court of the State of Washington, and the amount of bond be and hereby is fixed at Five Hundred Dollars ($500.00), and on giving of said bond by the Northern Pacific Railway Company, defendant, further proceedings herein shall be superseded.

FRANK H. RUDKIN,
Chief Justice.

Indorsed: No. 7776. The State of Washington ex rel. John D. Atkinson, Pltff. and Rspt., vs. Northern Pacific Railway Company, Dft. and Apllt. Order allowing writ of error. Filed Aug. 4, 1909. C. S. Reinhart, Clerk. Geo. T. Reid and J. W. Quick, Attorneys for N. P. Ry. Co.

39 In the Supreme Court of the State of Washington.

No. 7776.

THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON,
Plaintiff and Respondent,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant and Appellant.

Bond on Writ of Error.

Know all men by these presents:

That we, Northern Pacific Railway Company, a corporation, as principal, and National Surety Company, a corporation, as surety,

are held and firmly bound unto the State of Washington, plaintiff above named, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said State of Washington, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 2nd day of August, 1909.

Whereas, the above named defendant and appellant, Northern Pacific Railway Company, a corporation, has sued out a writ of error to the Supreme Court of the United States of America to have reviewed the judgment entered in the above entitled cause on the 28th day of June, 1909, by the supreme court of the State of Washington.

Now, therefore, the condition of this obligation is such that if the above named Northern Pacific Railway Company, a corpora-
40 tion, shall prosecute said writ to effect without unnecessary delay and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By GEO. T. REID, *Its Attorney.*
[SEAL.] NATIONAL SURETY COMPANY,
By W. H. OPIE, *Attorney in Fact.*

The foregoing bond is approved.

FRANK H. RUDKIN,
Chief Justice Supreme Court of Washington.

Indorsed: No. 7776. In the Supreme Court of the State of Washington. The State of Washington ex rel. John D. Atkinson, Pltff. and Respondt., vs. Northern Pacific Railway Co., a corporation, Dft. and Appllnt. Bond on writ of error. Filed Aug. 4, 1909. C. S. Reinhart, Clerk. Geo. T. Reid & J. W. Quick, Att'ys for N. P. Ry. Co., Tacoma, Washington.

41 In the Supreme Court of the State of Washington.

No. 7776.

THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON,
Respondent,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant.

Assignment of Errors.

Comes now the Northern Pacific Railway Company, defendant herein and plaintiff in error, and alleges the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause:

The Supreme Court of the State of Washington erred in its decision of this cause rendered June 28, 1909, in holding that Chapter 20, Laws of Washington 1907, entitled, "An Act regulating the hours of service of employees in train service upon railroads and providing a penalty" is not repugnant to and superceded by Chapter 2939 U. S. Statutes at Large, Vol. 34 page 1415, approved March 4, 1907, entitled, "An Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon" and in holding that the defendant, as a common carrier engaged in interstate commerce, is liable to the penalty of One Thousand Dollars ($1000.00) provided by said Chapter 20, Laws of Washington 1907, and in rendering judgment against this defendant.

GEO. T. REID AND
J. W. QUICK,
Att'ys for Northern Pacific Railway Company.

Indorsed: No. 7776. In the Supreme Court of the State of Washington. The State of Washington ex rel. John D. Atkinson, Respondent, vs. Northern Pacific Railway Company, Appellant. Assignment of errors. Geo. T. Reid, J. W. Quick, Att'ys for N. P. Ry. Co. Filed Jul- 30, 1909. C. S. Reinhart, Clerk.

42 The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest Court of law or equity in the said State in which a decision could be had, in a suit between The State of Washington ex rel. John D. Atkinson, Plaintiff and Respondent, and Northern Pacific Railway Company, a corporation, Defendant and Appellant, wherein was drawn in question the validity of a statute of said State of Washington, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath intervened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do Command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington, in the District of Columbia, within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error
43 what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court of the United States of America, this Fifth day of August, A. D. 1909, and of Our Independence One hundred Thirty-third.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western District of Washington.

43½ [Endorsed:] 7776. Filed Aug. 7, 1908. C. S. Reinhart, clerk.

44 In the Supreme Court of the United States.

No. —.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
v.
THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON, Defendant in Error.

Stipulation.

Come now W. P. Bell, Attorney General, and W. V. Tanner, Assistant Attorney General, of the State of Washington, and enter their general appearance as attorneys for the defendant in error in the above entitled action, and hereby waive the issuance and service of citation in the above entitled case.

W. P. BELL,
Attorney General of the State of Washington,
W. V. TANNER,
Assistant Attorney General of the State of Washington,
Attorneys for Defendant in Error in Above Entitled Case.

[Endorsed:] No. 7776. In the Supreme Court of the United States. Northern Pacific Railway Company, Plaintiff, vs. The State of Washington ex rel. John D. Atkinson, Defendant. Stipulation. Filed Aug. 9, 1909. C. S. Reinhart, Clerk.

45 In the Supreme Court of the State of Washington.

No. 7776.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON,
Defendant in Error.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause, and I further certify that in pursuance of the Writ of Error heretofore filed in this cause I now herewith transmit the said transcript together with the original Writ of Error and the original stipulation waiving Citation to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Olympia, this 4th day of September, 1909.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court
of the State of Washington.

46 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF WASHINGTON ex Rel. JOHN D. ATKINSON,
Defendant in Error.

Stipulation.

It is hereby stipulated between counsel for Plaintiff and Defendant in Error in above entitled case, that the Clerk of the Supreme Court of the United States need only print for the record in said case the following named parts of the transcript. (The numbers of the pages referred to being the figures in red ink in bottom right hand corner of pages.)

1. Complaint ..... Pages 3, 4 and 5,
2. Judgment ..... Page 9,
3. Amended Answer ..... Pages 15, 16, 17 and 18,
4. Opinion Supreme Court..... " 27 to 34 inclusive,
5. Petition for writ of error..... " 36 and 37
6. Order allowing writ of error..... Page 38,
7. Bond on writ of error..... Pages 39 and 40,

8. Assignment of errors.....Page 41,
9. Writ of Error.....Pages 42 and 43,
10. Stipulation waiving citation.....Page 44.
11. Judgment of Supreme Court..... " 35

C. W. BUNN,
GEO. T. REID,
J. W. QUICK,
Att'ys for Plaintiff in Error.
W. P. BELL AND
W. V. TANNER,
Att'ys for Defendant in Error.

Dated September 7th, 1909.

47 [Endorsed:] File No. 21,839. Supreme Court U. S., October Term, 1909. Term No. 613. Northern Pacific Railway Co., Pl'ff in Error, vs The State of Washington ex rel. J. D. Atkinson, Att'y Gen'l. Stipulation as to printing record. Filed October 11, 1909.

Endorsed on cover: File No. 21,839. Washington Supreme Court. Term No. 136. Northern Pacific Railway Company, plaintiff in error, vs. The State of Washington ex rel. John D. Atkinson, attorney general. Filed September 27th, 1909. File No. 21,839.

Office Supreme Court, U. S.
FILED.
DEC 20 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 136.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON ON RELATION OF JOHN D. ATKINSON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 136.

NORTHERN PACIFIC RAILWAY COMPANY.
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON ON RELATION OF JOHN D. ATKINSON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

On February 18, 1907, the State of Washington passed an act entitled "An Act regulating the hours of service of employes in train service upon railroads, and providing a penalty," which reads:

> Section 1. It shall be unlawful for any common carrier by railroad or any of its officers or agents, to require or permit any employe engaged in or connected with the movement of any train to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employe has started on his trip; or, except by accident or unavoidable delay of trains scheduled to make connection with the train on which such employe is serving, he is prevented from reaching his terminal; or, to require or permit any such employe who has been on duty sixteen consecutive hours to go on duty with-

out having had at least ten hours off duty; or, to require or permit any such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period to continue on duty without having had at least eight hours off duty within the twenty-four hour period.

Section 2. That any such common carrier, or any of its officers or agents violating any of the provisions of this Act is hereby declared to be guilty of a misdemeanor, and upon conviction thereof shall be liable to a penalty of not less than one hundred or more than one thousand dollars for each and every such violation to be recovered in a suit or suits to be brought by the Attorney General; and it shall be the duty of the Attorney General to bring such suits upon duly verified information being lodged with him of such violation having occurred, in any superior court; and it shall also be the duty of the Railroad Commission to fully investigate all cases of the violation of this Act, and to lodge with the Attorney General information of any such violation as may come to its knowledge." Laws of Washington for 1907, Chap. 20, p. 25.

This law became effective June 11, 1907, and its provisions touching hours of service are nearly like those of the act passed by Congress March 4, 1907, entitled "An Act To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon." 34 Statutes at Large, 1415.

Section 1 of the act of Congress applies its provisions to any common carrier or carriers engaged in the transportation of passengers or property by railroad from one state of the United States to another

state or from any place in the United States to an adjacent foreign country.

Section 5 reads:

"That this Act shall take effect and be in force one year after its passage."

This action was brought by the state of Washington in the Superior Court of the State on the relation of its Attorney General, against the plaintiff in error to recover a penalty under the state law: the charge being that plaintiff in error, on the third and fourth days of July, 1907, permitted some of its employees engaged in the train service to remain on duty more than sixteen consecutive hours.

The plaintiff in error answered the complaint, admitting that, as alleged, its employees were on duty more than sixteen consecutive hours, but denying that it thereby became liable to any penalty upon grounds set forth in the answer as follows:

> "1. It is a common carrier of persons and property within and between the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon. Its principal business is the carrying of persons and property to and from points within one state to and from points within other states, and to and from points within the several states of the United States to and from points in foreign countries. Defendant is engaged in the business of interstate commerce, and its lines of railroad, locomotives and cars are facilities provided for the carrying on of interstate commerce.
>
> 2. The line of railroad between the City of Seattle, in King County, Washington, and the City of Sedro-Woolley, in Skagit County,

Washington, is a part of the defendant's railway system, and is a part of its line of railroad connecting with the main line, extending from Ashland, Wisconsin, to Portland, Oregon, at Auburn, Washington, and thence running to the international boundary at Sumas. Freight train No. 41, described in the complaint, was, at the time, engaged in hauling various and sundry articles of merchandise from points outside of the State of Washington to points within the State of Washington, and was engaged in hauling various articles of merchandise from points within the State of Washington to points in British Columbia and other foreign countries, and was engaged in hauling various articles of merchandise through the State of Washington from points in other states to points in foreign countries.

3. The Fifty-ninth Congress of the United States passed an act regulating interstate commerce with respect to the hours of labor of persons employed in operating trains carrying interstate commerce, and on railroads engaged in interstate commerce. The Congress, as shown by its proceedings during the deliberations prior to the passage of said act, for the purpose of enabling the railroads to which it should be applicable to prepare for its operation by changing their division points and making such other changes as the operation of said act would necessitate, postponed the limitation of hours for work of persons employed in the operation of trains for the period of one year from and after the date of the passage of the act, towit: until the 4th day of March, 1908. The said act of the Congress of the United States is applicable to the railroad of the defendant, and was applicable at all the times stated in the complaint to the particular train and employes named in the complaint. After the passage of said act of the Congress, controlling this

defendant with reference to the hours of work of employes engaged in the operation of trains carrying interstate commerce, the law of the State of Washington (being Chapter 20 of the Laws of 1907), was not, and has not since been applicable to employes and trains of this defendant engaged in and carrying interstate commerce, and said law of the State of Washington was not at the time named in the complaint applicable to the particular train of this defendant therein designated.

4. The Constitution of the United States conferred upon the Congress exclusive power to regulate commerce between the states and with foreign countries. The act of the Congress regulating the subject of employment of labor on trains and railroads engaged in interstate commerce excludes regulation by the State of Washington.

5. The defendant claims immunity from being subject to Chapter 20 of the laws of the State of Washington, passed at the legislative session of 1907, and from all regulation imposed by virtue of any law of the State of Washington pertaining to the hours of labor and rest of persons employed in operating its trains engaged in interstate commerce. Defendant claims the right to employ persons in the operation of its trains engaged in interstate commerce without restriction of the number of hours of continuous service." (Transcript, pp. 3-5.)

The cause came on before the trial court upon the motion of the state for judgment upon the pleadings. This motion the trial court granted and rendered judgment against the plaintiff in error for $1,000, the maximum penalty provided by the state statute. (Transcript, p. 3.)

From this judgment an appeal was prosecuted to the Supreme Court of Washington and on the 28th day of June, 1909, that court affirmed the judgment of the trial court. (102 Pac. Rep. p. 876).

To review said decision this writ of error is sued out.

ASSIGNMENT OF ERROR.

The Supreme Court of the State of Washington erred in holding that the state statute is not repugnant to and superseded by the act of Congress, and in holding that the defendant below is liable to the penalty of One Thousand Dollars ($1000.00) provided by the state law.

ARGUMENT.

The sole question is whether the law of Washington above referred to, conflicts with the act of Congress and is therefore void. It is asserted to be inapplicable for the reason that at the time of the acts complained of Congress had assumed the regulation of the hours of labor of the employes in question.

For the purpose of this argument it may be admitted that in the absence of legislation by Congress the state statute would have been a valid exercise of the police power of the state and free from constitutional objection, even as to railroad employes engaged in interstate commerce.

But we contend that as Congress, by the act of March 4, 1907, completely regulated the hours of labor of the employes in question, the act of the Legislature of Washington was void as to such employes. The state court held that, because section 5 of the act of

Congress said it should "take effect one year after its passage," or on March 4, 1908, the act of the Legislature which became a law in June, 1907, was in force in July of that year and governed the case.

After March 4, 1908, the state law *clearly* was inoperative. *Baltimore and Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 136 Wis. 407.

We contend that during the year intervening between March 4, 1907, and March 4, 1908, Congress, in effect, had declared that commerce should be free from regulation in this respect; that for reasons which appealed to Congress it chose to permit a period of one year in which railroads might prepare themselves for changed conditions; and that thereby it closed the field against action in the meantime by the legislatures of the different states. Congress declared that before its act went into effect carriers should have a year to adjust themselves to the changed conditions. Had Congress thought the time ripe to put such regulation into effect, it would have made its act immediately operative. Congress would not without some reason it thought good deliberately enact such a law, and say it should not take effect until a year later. A glance at the records of Congress will disclose, beyond doubt, the reasons moving that body to postpone one year the act's taking effect.

The report of Mr. Esch, from the Committee on Interstate and Foreign Commerce, report No. 7641, dated February 16, 1907, says, on page 6:

> "Owing to the probable necessity of changing in some instances division points, entailing the removal of employees, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval."

In the Congressional Record, Mr. Stevens, of Minnesota, spoke on the 18th of February, explaining for the committee its report to the House. On page 3248 of the Record Mr. Stevens refers to the committee's consideration of the welfare of the public and its safety, to the conditions surrounding railways, to how they would be required to rearrange operating divisions, terminals and other things, and to the difficulty of properly protecting employes and at the same time not casting upon commerce and the railways a greater burden than fairly necessary.

Upon pages 3251 occurs the following:

> "Immediate Effect Oppressive.
>
> "Sixth. The Senate bill, by its terms, would be immediately effective, while the House bill would not take effect until one year from the date of its passage.
>
> It is conceded that the railways and some employees must make many changes by reason of the passage of this bill. Division points and terminals may be changed, and employees must then seek new homes, and this naturally requires time to properly carry out.
>
> Yet the Senate bill, oppressive and unnecessary on this point, is supported by the minority."

The record shows that the House committee report and recommendation were adopted by Congress. The Senate bill, S. 5133, was to take effect immediately,

but Congress agreed to the House amendments—among others, to the amendment postponing the effective date of the law to one year after its passage; and this extension was granted for the reasons above indicated.

To give the act of Washington effect after March 4, 1907, is to permit the state to regulate, after Congress entered the field, an instrumentality of interstate commerce. After Congress had determined that it wished to pass a sixteen-hour law, but that interstate commerce should have a year in which to readjust itself, the state legislature could not say, "We insist that the law shall take effect immediately," and proceed so to enact. No more can the state enforce after Congress acted, and during the days of grace granted by Congress, an act of the state passed at an earlier day.

The case of safety appliances is strictly analogous to this. The original Safety Appliance Act was approved March 2, 1893 (27 Stat. 531). The first section prohibited, after the first day of January, 1898, the use of locomotives not equipped with power brakes and the use of sufficient cars for train control unequipped with air; section 2 prohibited, after the first day of January, 1898, the use of cars unequipped with automatic couplers; section 4 prohibited, after the first day of July, 1895, unless otherwise ordered by the Interstate Commerce Commission, the use of cars without grab irons or hand holds. It is obvious that the railway equipment of the country could not be changed in a day to meet the requirements of this law. What time would be reasonable for that purpose was a feature of the regulation largely discussed and delib-

erately considered by Congress. The provisions of the act fixing the time which should be allowed to change railway equipment must be regarded as determinations by Congress that carriers reasonably were entitled for preparation to the times specified in the act. That a state legislature, after this act of Congress, could not have made the same requirements effective in shorter time seems to us obvious. And it seems equally obvious that to allow a state act previously passed to operate, after March 2, 1893, to compel *immediate* compliance with the act of Congress, would be to allow the state to overrule Congress. And where is the distinction between the case put and this? In case of the hours of labor, as in case of safety appliances, it is plain that the new requirements could not be made effective in a day. Some time at least was necessary for preparation. In either case the determination of Congress that a certain time was necessary is conclusive against state action in the meantime. It is not to be expected that Congress in any such case would insert in its act an express prohibition on the states.

In *Houston v. Moore*, 5 Wheat. 1, 21, Mr. Justice Washington said in delivering the opinion of the court:

> "Congress has power to provide for organizing, arming and disciplining the militia; and it is presumable that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if congress had declined to exercise them, it was competent to the state governments to provide for organizing, arming and disciplining their respective militia, in such manner as they might

think proper. But congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defense. After this, can the state governments enter upon the same ground—provide for the same objects, as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend, that unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States.

From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered, as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of congress, shall be a certain fine; if that provided by the state legislature for the same offense be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of congress is, nevertheless, thwarted and opposed.

This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim. If, in a specified case, the people

have thought proper to bestow certain powers on congress, as the safest depositary of them, and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse."

In *Prigg v. Pennsylvania*, 16 Peters 539, 617, the court said:

"In a general sense, this act may be truly said to cover the whole ground of the constitution, both as to fugitives from justice, and fugitive slaves; that is, it covers both the subjects, in its enactments; not because it exhausts the remedies which may be applied by congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the constitution; but because it points out fully all the modes of attaining those objects, which congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case,

> the legislation of congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of Houston v. Moore, (5 Wheat. 1, 21-2); where it was expressly held, that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."

In the case of *State of Pennsylvania v. The Wheeling Bridge Co.*, 13 How. 518, it was held that a bridge over the Ohio River, constructed under the authority of an act of Virginia, was a nuisance, notwithstanding the authority of that state, for the reason that Congress had acted upon the subject of commerce upon the Ohio River. It was said, p. 565:

> "It is objected that there is no act of Congress prohibiting obstructions on the Ohio River, and that until there shall be such a regulation, a State, in the construction of bridges, has a right to exercise its own discretion on the subject.
>
> Congress have not declared in terms that a State, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted."

The case of *Sinnot v. Davenport,* 22 How. 227, is a good illustration of the rule that where Congress has undertaken to regulate a branch of interstate commerce, no additional regulation by a state, by virtue of its police power, is permissible. In that case the court held that a law of Alabama, requiring masters of vessels navigating the waters of the state to file certain information with the probate judge before leaving the port of Mobile, was void, because Congress had covered that field by providing for the licensing of vessels engaged in the coasting trade.

In *Nashville, C. & St. L. Ry. Co. v. State of Alabama,* 128 U. S. 96, it was held that a law of Alabama requiring engineers and other trainmen to be examined by a medical board to determine whether or not they are "color-blind" is a valid exercise of the police power of the state in the absence of legislation by Congress. It was said, however, p. 99:

> "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on that subject."

It is a well known historical fact, that the principal cause which led to the enactment of the Constitution was the intolerable interference with commerce by the different states. It is also an interesting historical fact, that while the representatives of the different states in the constitutional convention had the greatest difficulty in arriving at a settlement of many of

the constitutional provisions, they were of one mind upon the necessity of vesting in Congress the power to regulate commerce with foreign nations and among the several states. The Court has held valid state police regulations of various kinds that affect interstate commerce incidentally, but any attempt by a state, under the guise of its police power, really to regulate commerce in such manner as substantially to interfere with, or impede, its free flow, has been held invalid. This Court likewise has held invalid attempts by states to change, interfere with, add to or supplement what Congress has seen fit to enact. Where Congress, even in the most general way, has assumed to regulate any branch of commerce, this court has held that the states are thereby excluded from the field. The cases heretofore cited are illustrations.

Commerce is a delicate thing, easily interfered with and retarded. Whenever Congress takes cognizance of any phase of interstate commerce it must be presumed that it has regulated as far as it thinks the subject ought to be regulated. It is just as if Congress declared in terms that no further regulation should be made.

Congress, knowing that before the sixteen-hour law, with fairness or safety, could be put into effect it would be necessary to change many division points, and train runs, to create new divisions, to increase the number of employes, to change the residence of many of them, and to make numerous other rearrangements, saw fit to say one year's time should be allowed for these purposes. But the Legislature of Washington saw fit to say that, in its opinion, less time for the change was

necessary. The state legislation is in conflict with and has overruled the determination of Congress.

The question involved has been decided by the Supreme Courts of at least three states other than Washington. Two of these courts, Missouri and Wisconsin, have decided in favor of our contention, and one, Montana, against it.

In the case of *State v. Missouri Pacific Ry. Co.*, 111 S. W. Rep. 500, decided by the Supreme Court of Missouri, June 6, 1908, the Railway Company was indicted for a violation of a statute of Missouri making it unlawful to permit a telegraph operator to be on duty more than eight hours in twenty-four. The Missouri Statute was approved April 12, 1907, and went into effect June 14, 1907. Upon motion of the defendant the indictment was quashed by the nisi prius court on the ground that the state statute was unconstitutional and in conflict with the Act of Congress of March 4, 1907, which by the terms of its 5th section went into effect March 4, 1908. The state appealed and the Supreme Court in deciding the cases says:

> "We must construe the federal act by reading into its dry letter its manifest spirit and purpose. Its dry letter reads that it shall not go into effect for one year. What was the meaning of, the object to be subserved by, that suspension of the operation of the law? What, except to preserve the equities of the situation by impliedly giving common carriers engaged in interstate commerce one year in which to get a supply of experienced telegraph and telephone operators and trainmen to carry on their business without interruption and hindrance,

and otherwise adjust their business affairs to the shorter hours required by that act? When broadly judged, the federal law must be construed as a notice (in the nature of a caveat) to all state Legislatures, first, that Congress has occupied the ground by its statutory regulations; second, that in its high wisdom it has prescribed and marked out a transition or preparatory period of one year (a sort of truce period.) Now with such broad and wise purposes read into the federal act shall any state Legislature thereafter sit in judgment upon the wisdom of such truce period, and say, in effect, "We deem it too long and too liberal?" Shall it say, in effect, "We see you have suspended your act for one whole year; we find by mathematical computation there is left six months or so which we may cover by a state law, and accordingly we shall pass a law giving shorter hours than yours that will be good at least from June 14, 1907, until March 4, 1908?" If the one law grants, by necessary implication, a breathing spell, shall the other take it away? If the one chalks out a policy, may the other rub it out?

In our opinion the comity that should exist between state and federal legislative power prohibits our taking that ungracious and narrow view."

In the case of *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 136 Wis. 407, decided September 29, 1908, an action was brought by the State against the Railway Company to recover the statutory penalty for a violation on January 11, 1908, of a statute of Wisconsin passed in 1907 making it unlawful for a railway company to allow, permit or require a telegraph operator to be or remain on duty more than eight consecutive hours.

The Supreme Court of Wisconsin in deciding the case, says:

"The Supreme Court of the United States, in *Covington B. Co. v. Kentucky, supra,* has classified that field into three classes of legislative acts: The first, where the states have plenary power and Congress has no right to interfere, which concern the strictly internal commerce of the state, and, while the regulation may affect interstate commerce indirectly, its bearing is so remote that it cannot be termed in any just sense interference. The second includes cases of what may be termed 'concurrent jurisdiction,' where the states may act in the absence of congressional action. Obviously this field must be one where Congress has right and power to act if it sees fit, but where some restraint and regulation is necessary, and the authority therefor is deemed to be conceded to the states pending nonaction of Congress. The third is the class where, from the very intimacy with and directness of effect upon interstate commerce of any legislative action, and national scope of the subject of legislation, it is presumed that the refraining of Congress from promulgating any regulations must be considered to declare a policy that the subject shall be free from regulation.

Pretty obviously, under the decisions of the Supreme Court of the United States, the act we are considering must fall in the second class. The safety of the public may be so imperiled by the employment of incompetent or disabled persons in and about railroads, navigation and the like that the necessity for some legislation in regard thereto is manifest, and the forbearance of Congress to legislate might well be deemed significant of its policy to leave the subject of regulation to the Legislatures of the several states. In this line it has been held that examination of pilots or railroad engineers with reference to physical capacity, especially color blindness, as a condition of their employment, is competent for a state. *Smith v. Alabama,* 124 U. S. 465, 8 Sup.

Ct. 564, 31 L. Ed. 508; *Nashville, Etc. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352. As pointed out in the latter case (page 101 of 128 U. S., page 29, of 9 Sup. Ct., [32 L. Ed. 352]): 'Such legislation is not directed against commerce. It only affects it incidentally.' In the former case it is suggested that acts much more intimately connected with the commerce itself would be competent, such as those requiring safe guards and signals in running trains, provision for the safety of passengers, regulating the manner of heating cars (*New York, Etc., Ry. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853), regulating the speed of trains (*Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897), requiring the stopping of trains at certain stations (*Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064), and others of like import. From these we cannot doubt that prohibition of an overfatigued telegraph operator from directing the operation of trains falls within the state's power to control, even though thereby the conduct of interstate commerce might be impeded or burdened. But this power in the states is subject to that provision in the Constitution that Congress shall have power to regulate interstate commerce; that is, to prescribe the restrictions and limitations under which it shall be conducted, and when it prescribes those regulations it does so to the exclusion of state legislation accomplishing a like regulation directly or indirectly, and whether intended for that purpose or not. That is declared in all of the cases above cited, conceding to the states authority over such subjects in the absence of congressional legislation.

Within the field of authorized congressional action the federal power must, in the nature of things, be supreme in all parts of the United States. 'This Constitution, and the laws of the United States which shall be made in pur-

suance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.' Article 6, par. 2, Const. U. S. In *Cooley v. Board of Wardens*, 12 How. 299, 318, 13 L. Ed. 996, it was said of this class of legislation: 'It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional legislation.' In *State of Pennsylvania v. Wheeling, Etc., Co.*, 18 How. 481, 15 L. Ed. 435, where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge, 'if Congress chooses to act, its action necessarily precludes the action of the state.' In *United States v. Colorado & N. W. R. Co.* (C. C. A.) 157 Fed. 321, 330, Sanborn, J., remarks: 'The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and, if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. * * * That power is not subordinate, but it is paramount, to all the powers of the states. If its independent and lawful exercise of this congressional power and the attempted exercise by a state of any of its powers impinge or conflict, the former must prevail and the latter must give way.' See, also, *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210, 6 L. Ed. 23. It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a state will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the

subject; the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the states of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the state to exercise that authority which by the Constitution of the United States was surrendered to the federal government when and if Congress deemed its exercise advisable.

On March 4, 1907, before the act now under consideration was passed, and even before it was introduced in the Wisconsin Legislature, Congress had legislated fully upon the subject of hours of labor for the very class of employes affected by Section 1816m. It then provided (Act March 4, 1907, p. 1415, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1907, p. 913]), that it should be unlawful for any common carrier subject to the act to require or permit any employe subject to the act to be or remain on duty for a period longer than 16 consecutive hours, and that no operator or train dispatcher should be required or permitted to remain on duty for a longer period than 9 hours in any twenty-four-hour period in places continuously operated night and day, nor for a longer period than 13 hours in places operated only during the day time, with exceptions in case of emergencies. This was a clear declaration by Congress of a will and policy, that, so far as the regulation and safeguarding of interstate commerce might properly be affected by prescribing hours of labor for such employes, the subject should be under control of Congress, and not of the State Legislatures. Doubtless the State Legislatures persisted in their power to protect the safety of their respective communities by rea-

sonably regulating the hours of service of railroad employes, with the limitation, however, that they must not thereby restrict or effectively regulate interstate commerce. Under many of the decisions above cited the state was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from state competency. *State v. Mo., etc., Ry.* (Mo.) 111 S. W. 500.

In the case of *State v. Northern Pacific Ry. Co.*, 93 Pac. 945, decided by the Supreme Court of Montana February 25, 1908, that court holds that a statute of Montana regulating the hours of labor of railway employes was not invalidated by the Act of Congress of March 4, 1907, until that act went into effect on March 4, 1908, and bases its decision upon the authority of *Smith v. Alabama*, 124 U. S. 465, which it admits "is not directly in point", and upon *Sherlock v. Alling*, 93 U. S. 99, which the court says "seems also to support this conclusion". An examination of these cases shows that they not only do not support the conclusion but are hardly in point.

In *Smith v. Alabama*, the court said p. 473:

> "As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden."

Certainly in the case at bar it is manifest that Congress when it passed the Act of March 4, 1907, intended to leave the matter of the regulation of the hours of labor of employes of interstate railways "free and unfettered" until March 4, 1908.

In the case at bar the Supreme Court of Washington reviewed *State v. Missouri Pacific Ry. Co.* and *State v. Chicago, Milwaukee & St. Paul Ry. Co., supra,* but declined to follow them holding that the Statute of Washington which went into effect June 11, 1907, was in force and a valid law on July 3rd and 4th, 1907, for the reason that the Act of Congress of March 4, 1907, did not by its terms go into effect until March 4, 1908.

In deciding the case the Supreme Court of Washington cited as supporting its decision *Larrabee v. Talbott,* 5 Gill 429.

That case was decided by the Supreme Court of Maryland in 1847 and holds that the insolvency laws of Maryland were not suspended before the Federal Bankruptcy Act of 1841 became effective, which was on a day named after its passage; that when the controversy involved in that case arose the Federal Bankruptcy Act "was not in force and there could have been no conflict between the national and state legislatures upon the subject".

The difference between this case and that of *Larrabee v. Talbott* is, that here it appears, from the regulating act passed by Congress taken in connection with the nature of the subject regulated, that Congress as part of its regulation said carriers should have a year within which to make the changes of operation necessary to put the congressional act into effect; whilst

in the case of the Bankruptcy Act there is no ground for drawing such an inference.

It is respectfully submitted that the decision of the Supreme Court of Washington should be reversed.

CHARLES W. BUNN,
For Plaintiff in Error

Office Supreme Court, U. S.
FILED.
DEC 22 1911
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 136.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON *EX REL.* JOHN D. ATKINSON, ATTORNEY GENERAL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

W. V. TANNER,
Attorney General of the State of Washington, Counsel for Defendant in Error.

(21,839.)

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BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This action was begun in the Superior Court of Thurston County, State of Washington, against the plaintiff in error, for the recovery of a penalty for violation of chapter 20 of the Session Laws of Washington for 1907, entitled "An act regulating the hours of service of employees in train service upon railroads, and providing a penalty." The

act referred to was adopted by the legislature of Washington at its session in 1907, and approved by the Governor on February 18 of that year. By the act it was made unlawful for any common carrier operating a railroad to require or permit any of its employees engaged in or connected with the movement of any train to remain on duty for a longer period than sixteen consecutive hours, except in specified instances. In its answer the plaintiff in error alleged by way of affirmative defense that it was a carrier engaged in commerce between the States, and that upon the occasion set forth in the complaint the train therein described was engaged in hauling various and sundry articles of merchandise from points outside the State of Washington to points within the State of Washington (Transcript of Record, pp. 4 and 5). It was further alleged that the fifty-ninth Congress of the United States passed an act regulating interstate commerce with respect to the hours of labor of persons employed in operating trains carrying the same, on the 4th day of March, 1907, and for the purpose of enabling the railroads to which it should be applicable to prepare for its operation by changing their division points and making such other changes as the operation of said act would necessitate postponed the limitation to hours for work of persons employed in the operation of trains for the period of one year from and after the date of the passage of the act, to wit, until the 4th day of March, 1908; that the act of

Congress referred to superseded the law of the State of Washington; and that since the passage of the act of Congress referred to the law of the State has not been applicable to trains carrying interstate commerce.

Upon a motion for judgment upon the pleadings judgment was entered against plaintiff in error in the sum of one thousand dollars (Transcript of Record, p. 3). This judgment was sustained by the Supreme Court of the State upon appeal, and from the judgment of the Supreme Court this writ of error was allowed.

ARGUMENT.

The sole question presented to this court for determination is whether the act of Congress of March 4, 1907, which in terms provided that it should "take effect and be in force one year after its passage" (34 Statutes at Large, p. 1415) was repugnant to, and therefore superseded, the act of the legislature of the State of Washington approved February 18, 1907, and effective under the provisions of the Constitution of the State June 12, 1907. The acts are almost identical in terms. In each the hours of labor of those engaged in train service is limited to sixteen consecutive hours. (For convenience the State act is printed in full in the appendix.)

That an act regulating the hours of labor of employees engaged in train service on railroads is

within the police power of the State seems very clear. In Cleveland, &c., Railway Co. *vs.* Illinois (177 U. S., 514) this court, summarizing the cases theretofore decided, used the following language:

> "Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.
>
> "We have recently applied this doctrine to State laws requiring locomotive engineers to be examined and licensed by the State authorities (*Smith vs. Alabama,* 124 U. S., 465; 31 L. ed., 508; 8 Sup. Ct. Rep., 564), requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, C. & St. L. R. Co. vs. Alabama,* 128 U. S., 96; 32 L. ed., 352; 2 Inters. Com. Rep., 238; 9 Sup. Ct. Rep., 28), requiring telegraph companies to receive despatches and to transmit and deliver them with due diligence, as applied to messages outside the State (*Western U. Teleg. Co. vs. James,* 162 U. S., 650; 40 L. ed., 1105; 16 Sup. Ct. Rep., 934), forbidding the running of freight trains on Sunday (*Hennington vs. Georgia,* 163 U. S., 299;

41 L. ed., 166; 16 Sup. Ct. Rep., 1086), requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Chicago & N. W. R. Co. vs. Fuller,* 17 Wall., 560; 21 L. ed., 710), forbidding the consolidation of parallel or competing lines of railway (*Louisville & N. R. Co. vs. Kentucky,* 161 U. S., 677; 40 L. ed., 849; 16 Sup. Ct. Rep., 714), regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*New York, N. H. & H. R. Co. vs. New York,* 165 U. S., 628; 41 L. ed., 853; 17 Sup. Ct. Rep., 418), providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, M. & St. P. R. Co. vs. Solan,* 169 U. S., 133; 42 L. ed., 688; 18 Sup. Ct. Rep., 289), and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*Richmond & A. R. Co. vs. R. A. Patterson Tobacco Co.,* 169 U. S., 311; 42 L. ed., 759; 18 Sup. Ct. Rep., 335). In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce."

While a State may not "regulate" interstate or foreign commerce, yet State authority over the same is not wholly excluded in the absence of Congressional action, for State legislation in many ways may affect such commerce and the persons engaged therein without constituting a "regulation" of it within the meaning of the Federal Constitution. It is true that acts of Congress adopted in pursuance of the power to regulate commerce may, and often do, extend to matters within the police power of the State, and to the extent that such regulations are within the proper constitutional power of Congress the police measures of the State are superseded. Congress may see fit to occupy the whole field, or only a part of it, but in each case the States are free to exercise their police powers unless such exercise results in a conflict with the acts of Congress. It is apparent, therefore, that in order to determine whether any particular act of Congress passed in pursuance of its power to regulate commerce operates to supersede State legislative action upon the same subject, regard must be had to the purpose of the Congressional enactment, and the object sought to be attained thereby.

This court has repeatedly announced the rule that the question of conflict is to be determined by the ordinary rules of statutory construction, and that it should not be held that the State legislation has been superseded except in cases of manifest

repugnancy. In the case of Reid *vs.* Colorado (187 U. S., 137-48), the court said:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' Sinnot *vs.* Davenport, 22 How., 227, 243."

Again, in Missouri, &c., Railroad Co. *vs.* Haber (169 U. S., 613-23):

> "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

It is submitted that there is no repugnancy between the act of Congress effective March 4, 1908,

and the act of the legislature effective July 12, 1907, during the interim preceding the taking effect of the act of Congress.

As a general rule a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect.

Rice *vs.* Ruddiman, 10 Michigan, 125.
Price *vs.* Hopkins, 13 Michigan, 318.
Grant *vs.* Alena, 107 Michigan, 335.
G., H. & S. A. Railway Co. *vs.* State, 81 Texas, 572.
Jackman *vs.* Garland, 64 Maine, 133.
Evansville, &c., R. R. Co. *vs.* Barbee, 59 Indiana, 592.
26 American and English Encyclopedia of Law, 565.

The identical question before the court in the case at bar was considered by the Supreme Court of Montana in State *vs.* Northern Pacific Ry. Co. (36 Montana, 582). The court there said (p. 591):

> "We do not see how an act which does not by its own terms become a rule of conduct until a future time, can be said to displace another existing rule on the same subject during the interval between the time of its enactment and the time it becomes operative, even though the existing rule be inconsistent with it, in the absence of some express or implied declaration of a pur-

pose that such shall be the result. Legislation is not effective for any purpose until it becomes effective. In a given case the effective operation of a statute requiring expensive preparation, or a change in the mode of conducting business on the part of those whom it is intended to affect, may very properly be deferred to a future time. So far as it provides for such adjustment and changes, it may be said to have a quasi-operative effect; but even in such cases the existing law must be regarded as remaining in force until it is actually displaced by the new one. The act of Congress contains no such declaration, and we hold that the State statute, which was valid and in force at the time of its passage, remains in force until the act of Congress becomes effective."

This question has been passed upon by the Supreme Courts of four of the States. In Montana and Washington it has been held that the act of Congress is not repugnant to acts theretofore adopted by the State legislatures. In Missouri and Michigan the courts have reached the contrary conclusion (State *vs.* Chicago, M. & St. P. Ry. Co., 136 Wisconsin, 407; 117 N. W., 686, and State *vs.* Missouri Pacific Ry. Co., 212 Missouri, 658; 111 S. W., 500).

It is submitted, however, that the decision of the Supreme Court of Washington is supported by the better reasoning.

W. V. TANNER,

Attorney General of the State of Washington, Counsel for Defendant in Error.

APPENDIX.

An Act Regulating the Hours of Service of Employees in Train Service upon Railroads, and Providing a Penalty.

Be it Enacted by the Legislature of the State of Washington:

SECTION 1. It shall be unlawful for any common carrier by railroad, or any of its officers or agents, to require or permit any employee engaged in or connected with the movement of any train to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip; or, except by accident or unavoidable delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal; or, to require or permit any such employee who has been on duty sixteen consecutive hours to go on duty without having had at least ten hours off duty; or, to require or permit any such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period to continue on duty without having had at least eight hours off duty within the twenty-four hour period.

SEC. 2. That any such common carrier, or any of its officers or agents violating any of the provisions of this act is hereby declared to be guilty of a misdemeanor, and upon conviction thereof shall be liable to a penalty of not less than one hundred or more than one thousand dollars for

each and every such violation, to be recovered in a suit or suits to be brought by the Attorney General; and it shall be the duty of the Attorney General to bring such suits upon duly verified information being lodged with him of such violation having occurred, in any superior court; and it shall also be the duty of the Railroad Commission to fully investigate all cases of the violation of this act, and to lodge with the Attorney General information of any such violation as may come to its knowledge.

Passed the House January 29th, 1907.

Passed the Senate February 7, 1907.

Approved by the Governor February 18, 1907.

[14844]

NORTHERN PACIFIC RAILWAY CO. *v.* STATE OF WASHINGTON EX REL. ATKINSON, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 136. Submitted December 19, 1911.—Decided January 9, 1912.

A train moving and carrying freight between two points in the same State, but which is hauling freight between points one of which is within and the other without the State, or hauling it through the State between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto. *Southern Railway Co.* v. *United States*, 222 U. S. 20.

The right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has

been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power.

Congress by enacting a statute in regard to a subject within its exclusive power manifests its purpose to call that power into effect, and at once removes that subject from the sphere of state action and even if Congress provides that the statute shall not go into effect until a subsequent date the States lose control of that subject during the intermediate period from the enactment to the active operation of the statute.

The enactment by Congress of the Hours of Service Law, March 4, 1907, c. 2939, 34 Stat. 1415, was a manifestation by Congress of its intent to bring the subject of hours of labor of employés of interstate carriers under its control; and, although the act did not go into effect for a year after its passage, the various state laws on the subject became inoperative at once on the enactment.

In this case the court referred to the report of the committee of Congress having the legislation in charge as indicating the intent of Congress in enacting the statute.

53 Washington, 673, reversed.

THE facts are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error:

In the absence of legislation by Congress the state statute would have been a valid exercise of the police power of the State and free from constitutional objection, even as to railroad employés engaged in interstate commerce. But as Congress, by the act of March 4, 1907, completely regulated the hours of labor of the employés in question, the act of the legislature of Washington was void as to such employés.

After March 4, 1908, the state law clearly was inoperative, *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *State* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 136 Wisconsin, 407, and during the year intervening between March 4, 1907, and March 4, 1908, Congress, in effect, had declared that commerce should be free from regulation in this respect. Had Congress thought the time ripe to put such regulation into effect,

it would have made its act immediately operative. Congress would not without some reason it thought good deliberately enact such a law, and say it should not take effect until a year later. See report of Mr. Esch, from Committee on Interstate and Foreign Commerce, No. 7641, February 16, 1907, p. 6; also see speech of Mr. Stevens, of Minnesota, Cong. Rec., Feb. 18, 1907, pp. 3248, 3251. This report and recommendation were adopted by Congress. Senate bill, No. 5133, was to take effect immediately, but Congress agreed to the House amendments—including the one postponing the effective date of the law to one year after its passage.

The case of safety appliances is strictly analogous to this in granting delay, as it was obvious that the railway equipment of the country could not be changed in a day to meet the requirements of the law. In case of hours of labor, as in that of safety appliances, it is plain that the new requirements could not be made effective in a day. Some time at least was necessary for preparation. In either case the determination of Congress that a certain time was necessary is conclusive against state action in the meantime. It is not to be expected that Congress in any such case would insert in its act an express prohibition on the States. *Houston* v. *Moore*, 5 Wheat. 1, 21; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; *Sinnot* v. *Davenport*, 22 How. 227; *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96.

It is a well-known historical fact that the principal cause which led to the enactment of the Constitution was the intolerable interference with commerce by the different States.

Commerce is a delicate thing, easily interfered with and retarded. Whenever Congress takes cognizance of any phase of interstate commerce it must be presumed that it has regulated as far as it thinks the subject ought to be

regulated. It is just as if Congress declared in terms that no further regulation should be made.

Congress, knowing that before the sixteen-hour law could, with fairness or safety, be put into effect it would be necessary to change many division points, and train runs, to create new divisions, to increase the number of employés, to change the residence of many of them, and to make numerous other rearrangements, saw fit to say one year's time should be allowed for these purposes. But the legislature of Washington saw fit to say that, in its opinion, less time for the change was necessary. The state legislation is in conflict with and has attempted to overrule the determination of Congress.

The question involved has been decided by the supreme courts of at least three other States. Missouri and Wisconsin have decided in favor of appellants' contention, and Montana against it—see *State* v. *Missouri Pacific Ry. Co.*, 111 S. W. Rep. 500; *State* v. *Chic., Mil. & St. P. Ry. Co.*, 136 Wisconsin, 407. In *State* v. *Nor. Pac. Ry. Co.*, 93 Pac. Rep. 945, the Supreme Court upheld the state act on the authority of *Smith* v. *Alabama*, 124 U. S. 465, and *Sherlock* v. *Alling*, 93 U. S. 99, but these cases not only do not support the conclusion but are hardly in point. So also as to the case of *Larrabee* v. *Talbott*, 5 Gill, 429, on which the court below based its decision.

Mr. W. V. Tanner, Attorney General of the State of Washington, for defendant in error:

An act regulating the hours of labor of employés engaged in train service on railroads is within the police power of the State. *Cleveland &c. Railway Co.* v. *Illinois*, 177 U. S. 514, and cases there cited.

While a State may not "regulate" interstate or foreign commerce, yet state authority over the same is not wholly excluded in the absence of congressional action, for state legislation in many ways may affect such commerce and

the persons engaged therein without constituting a "regulation" of it within the meaning of the Federal Constitution.

The question of conflict is to be determined by the ordinary rules of statutory construction, and it should not be held that the state legislation has been superseded except in cases of manifest repugnancy. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Missouri &c. Railroad Co.* v. *Haber*, 169 U. S. 613, 623.

There is no repugnancy between the act of Congress effective March 4, 1908, and the act of the legislature effective July 12, 1907, during the interim preceding the taking effect of the act of Congress.

As a general rule a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. *Rice* v. *Ruddiman*, 10 Michigan, 125; *Price* v. *Hopkins*, 13 Michigan, 318; *Grant* v. *Alena*, 107 Michigan, 335; *H., H. & S. A. Railway Co.* v. *State*, 81 Texas, 572; *Jackman* v. *Garland*, 64 Maine, 133; *Evansville &c. R. R. Co.* v. *Barbee*, 59 Indiana, 592; 26 Am. & Eng. Ency. of Law, 565

The identical question before the court in the case at bar was considered by the Supreme Court of Montana in *State* v. *Northern Pacific Ry. Co.*, 36 Montana, 582, in which the court held that in the absence of some express or implied declaration of a purpose that such shall be the result, legislation is not effective for any purpose until it becomes effective. The act of Congress contains no such declaration, and the state statute, which was valid and in force at the time of its passage, remains in force until the act of Congress becomes effective.

This question has been passed upon by the supreme courts of four of the States. In Montana and Washington it has been held that the act of Congress is not repug-

nant to acts theretofore adopted by the state legislatures. In Missouri and Michigan the courts have reached the contrary conclusion. *State* v. *Chicago, M. & St. P. Ry. Co.*, 136 Wisconsin, 407; 117 N. W. Rep. 686, and *State* v. *Missouri Pacific Ry. Co.*, 212 Missouri, 658; 111 S. W. Rep. 500. The decision of the Supreme Court of Washington is supported by the better reasoning.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On July 3 and 4, 1907, the Northern Pacific Railway Company, in operating a train on its road in the State of Washington, permitted some of the train crew to remain on duty more than sixteen consecutive hours. This being apparently contrary to the prohibition of the act of Congress known as the "Hours of Service" law, approved March 4, 1907, c. 2939, 34 Stat. 1415, if the railroad company in the operation of the train was subject to the power of Congress and the prohibitions of the act were otherwise applicable, there was a violation of the act and a liability to its penalties.

The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling. *Southern Railway Co.* v. *United*

States, 222 U. S. 20. But while thus governed by the act of Congress the prohibitions of that act were not operative. This follows, by reason of the provisions of § 5 to the following effect: "That this Act shall take effect and be in force one year after its passage."

About a month before the occurrences heretofore referred to, that is, on June 12, 1907 (Laws 1907, p. 25, c. 20) a law of the State of Washington regulating the hours of service of railway employés became effective. Without going into detail it suffices to say that the provisions of that act greatly resembled those of the act of Congress and prohibited the consecutive hours of service which had taken place on the train of the Northern Pacific road. The Attorney General of the State commenced the proceeding now before us to recover penalties for the violation of the state law. The railroad answered, admitted the acts complained of, but denied any liability for the penalties imposed by the state law. The denial was based upon the assertion that the train was an interstate train, and was not subject to the control of the State because within the exclusive authority of Congress, manifested by the enactment of Congress on that subject. The trial court granted a motion for judgment upon the pleadings and awarded one thousand dollars penalty, and it is to a judgment of the Supreme Court of the State affirming such action that this writ of error is prosecuted.

Considering the character of the transportation, the court below held that the train was an interstate train, and within the potentiality of the exercise by Congress of its power to regulate commerce. Despite this, it was held that the penalty had been rightly imposed, because until Congress had acted upon the subject it was competent for the State to make a regulation concerning the hours of service of employés on railroad trains moving within the State, and to apply such regulation to a train engaged in interstate commerce. This, however,

was based, not upon a supposed concurrent state and Federal power, but solely on the ground that Congress had not acted on the subject, and therefore the state regulation should be applied. Indeed, the court in express terms declared that if Congress had legislated "its act supersedes any and all state legislation on that particular subject," and it was stated that the State in argument had so conceded.

The court said (53 Washington, 673, 676):

"On the other hand, it is conceded by the State that the power of the Congress to regulate interstate commerce is plenary, and that, as an incident to this power, the Congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employé of a carrier so engaged shall be required to remain on duty; and that when it does legislate upon the subject, its act supersedes any and all state legislation on that particular subject. In fact, these propositions can hardly be said to be debatable in the state courts, since the Federal courts, whose decisions are authoritative on questions of this character, have repeatedly announced them as governing principles in determining the validity of regulative legislation concerning carriers of interstate commerce. *Escanaba &c. Transp. Co.* v. *Chicago*, 107 U. S. 678; *Morgan &c. S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455; *Nashville &c. R. Co.* v. *Alabama*, 128 U. S. 96; *Gladson* v. *Minnesota*, 166 U. S. 427; *Lake Shore &c. R. Co.* v. *Ohio*, 173 U. S. 285; *Erb* v. *Morasch*, 177 U. S. 584."

Thus, conceding the paramount power of Congress, the operative force of the state law was solely maintained over the interstate commerce in question because of the provision of the act of Congress providing that it should not take effect until one year after its passage. As a result, the act was treated as not existing until the expiration of a year from its passage. Copiously referring

to authorities as to when a legislative act was to be treated as taking effect, the court said (p. 678):

". . . It seems clear that the Federal statute did not speak as a statute until after March 4, 1908, the date on which it went into effect; for if a law passed to take effect at a future day must be construed as if passed on that day, and if, prior to the time it goes into effect, no rights can be acquired under it and no one is bound to regulate his conduct according to its terms, it is idle to say that it has the effect of a statute between the time of its passage and the time of its taking effect. A statute cannot be both operative and inoperative at the same time. It is either a law or it is not a law, and, without special words of limitation, when it goes into effect for one purpose it goes into effect for all purposes."

But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postpon-

ing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.

We do not pause to cite authorities additional to those referred to by the court below, but we observe in passing that the aspect in which we view the question was cogently stated by the Supreme Court of the State of Missouri in *State* v. *Missouri Pacific Ry. Co.*, 212 Missouri, 658, and has also been lucidly expounded by the Supreme Court of the State of Wisconsin in *State* v. *Chicago, M. & St. P. Ry. Co.*, 136 Wisconsin, 407.

But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one year the meaning which must be affixed to it in order to hold that during the year of postponement state police laws applied. In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision if it was contemplated that the prohibitions of state laws should apply in the meantime. This is true because if it be that it was contemplated that the subject dealt with should be controlled during the year by state laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a state regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act, a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which

caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein it was said (Report No. 7641, dated February 16, 1907, p. 6):

"Owing to the probable necessity of changing in some instances division points, entailing the removal of employés, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval."

For the reasons stated the judgment of the Supreme Court of the State of Washington must be and it is

Reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion.